SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973
NO. 73-1823

GARY VAN GUNDY, and
RIVERGATE NEWS AGENCY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

ROBERT EUGENE SMITH,
Suite 2005
100 Colony Square
Atlanta, Georgia 30361

Attorney for Petitioners

GILBERT H. DEITCH

Of Counsel.

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PETITION FOR REHEARING

Petitioners GARY VAN GUNDY and RIVERGATE NEWS AGENCY, INC. respectfully present this Petition for Rehearing and pray the Court for an Order vacating its denial of

the Petition for Writ of Certiorari entered on November 11, 1974, and granting the Petition. The Petition for Rehearing is confined to substantial grounds available to Petitioners, although not previously presented, and to intervening circumstances of substantial and controlling effect.

1. In Hamling v. United States, ___ U.S. ___, 41 L.Ed.2d 590 and Jenkins v. Georgia, ___ U.S. ___, 41 L.Ed.2d 642, this Court reaffirmed its position that when presented with the question, it would exercise an independent judicial review of the obscenity vel non of material in a constitutional sense. Petitioners herein in their Petition did desire serious attention and review of the issue of obscenity vel non. A reading of the Petition at pages 37-39 indicate that this issue was presented with accu-

racy, brevity, and clearness. Petitioners' argument stated that:

> As a matter of law the publications herein are entitled to constitutional protection. Each of the publications is not utterly without redeeming social value or importance and these publications have serious literary, artistic and scientific value. The publications are similar to and in no way significantly different from publications which were held to be entitled to constitutional protection by this Court. Weiner v. California, 404 U.S. 988; Burgin v. South Carolina, 404 U.S. 806; Pinkus v. Pitchess, 429 F.2d 416 (9 Cir. 190), affirmed sub. nom. California v. Pinkus, 400 U.S. 922.

This Court's decision in Hamling and Jenkins clearly establish a judicial responsibility for an independent determination of obscenity vel non. But such responsibility was unclear at the time of the non-jury trial and circuit appeal, and those courts each exercised different views of the constitutional protection afforded to the press materials.

Trinkler v. Alabama, No. 73-844, raised the same argument of non-obscenity, and requested an independent judicial review. The materials therein were certified to this Court, and those materials are markedly similar to the press materials at Bar. This Court granted certiorari and vacated and remanded Trinkler for reconsideration in light of Hamling and Jenkins.

Mr. Justice White said in J-R Distributors, Inc., No. 73-937, that he joined in denying certiorari in three cases

partially because the courts below had determined obscenity vel non. However, in Jenkins, a finding of obscenity in the court below did not preclude reversal of that decision by this Court. Mr. Justice Rehnquist said for this Court that:

> Appellee contends essentially that under *Miller* the obscenity *vel non* of the film "Carnal Knowledge" was a question for the jury, and that the jury having resolved the question against appellant, and there being some evidence to support its findings, the judgment of conviction should be affirmed. We turn to the language of *Miller* to evaluate appellee's contention ....
>
> But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive." Not only did we there say that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," 413 U.S. at 25, but we made it plain that under that

> holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . ." 413 U.S., at 27.

___ U.S. ___, 41 L.Ed.2d at 649-650.

The Petitioners' case thus clearly falls within the independent review described above in Jenkins.

2. This Court in *Miller v. California*, 413 U.S. 15, rejected "national community standards" as unworkable and an exercise in futility. In his dissent to the denial of certiorari herein, Mr. Justice Brennan (Stewart and Marshall, J.J., joining) stated that:

> Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling v. United States*, — U.S. — (1974), I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

After the Petition for Writ of Certiorari was filed in this case, this Court decided *Hamling v. United States*, ____ U.S. ____, 41 L.Ed.2d 590. In *Hamling*, one of the issues this

Court addressed itself to was the use of national community standards in the trial court's instructions to the jury. In rejecting the Petitioners claims that the use of national standards prejudiced them because of this Court's holding in *Miller v. California*, 413 U.S. 15, Mr. Justice Rehnquist said that:

> . . . there is no doubt that its *occasional references* to the community standards of the "country as a whole" delineated a wider geographical area than would be warranted by *Miller, 12 200-ft. Reels of Film*, and our construction of section 1461 herein, *ante*, at ____. Whether petitioners were materially prejudiced by those references is a different question. Certainly the giving of such an instruction does not render their convictions void as a matter of constitutional law. This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of "contemporary community standards" is to assure that the material is judged neither on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insensitive person or group. *Miller v. California, supra*, 413 U.S. at 33, *Mishkin v. New York*, 383 U.S. 502, 508-509 (1966); *Roth v. United States*, 354 U.S. 476, 489 (1957). The District Court's instructions in this case, *including its* reference to the standards of the "country as a whole," undoubtedly accomplished this purpose.

____ U.S. ____, 41 L.Ed.2d at 614-15 (emphasis supplied).

It is thus clear that *Hamling* is not "on all fours' with the facts presented herein. In the trial court below, the instructions centered solely on national standards, whereas the jury instructions in *Hamling* contained mixed references to

both local and national community standards. The Court of Appeals for the Fifth Circuit claimed to give the Petitioner the benefit of both the *Roth-Memoirs* standards and the *Miller* standards, 490 F2d at 77, but gave no support for such a claim. The trial of Petitioners proceeded on a theory of national standards, and the Petitioners were not charged with violating the local standards of New Orleans, Louisiana. Indeed, they were not given an opportunity to present evidence and a defense regarding such standards. There was thus no evidence adduced at trial and present in the record for the Court of Appeals to make a determination that local community standards had been contravened and upon which it could assert that the Petitioners were being given the "benefit" of *Miller*.

A comparison of the "occasional references" in *Hamling* with the homogeneous instructions herein is a comparison of apples and oranges. There were no occasional references here, but references *solely* to national standards. Mr. Justice Rehnquist in announcing this Court's decision in *Hamling* stated:

> A juror is entitled to draw on his *own* knowledge of the views of the average person *in the community or vicinage from which he comes* for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U.S. 407, 409 (1953); *Schultz v. Pennsylvania R. Co.*, 350 U.S. 573, 525-526 (1956).
>
> * * * * *
>
> The result of the *Miller* cases. . . . as a matter of

> constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge *of the community or vicinage from which he comes* in deciding what conclusion "the average person applying contemporary community standards" would reach in a given case.

_____U.S. ____, 41 L.Ed.2d at 613.

As this Court approved in *Miller*, Mr. Chief Justice Warren's dissent in *Jacobellis v. Ohio*, 378 U.S. 184, 199, that community standards were first definitively enunciated by this Court in *Hamling*, then the judgment below cannot stand because the Petitioners were deprived of due process of law because of conviction of a charge not made and on one theory not tried: local standards.

As stated above, Mr. Justice Rehnquist dismissed the "national standards" argument of the petitioner in *Hamling* because the jury instructions contained only non-prejudicial "references" to the "country as a whole":

> . . . we hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction would have materially affected the deliberations of the jury. Cf. *Namet v. United States*, 373 U.S. 179, 190-191 (1963); *Lopez v. United States*, 373 U.S. 427, 436 (1963). Our examination of the record convinces us that such a probability does not exist in this case.

____ U.S. ____ 41 L.Ed.2d at 615. If references to national standards are excised from this case, then there remains nothing on which a jury may base a conviction, and,

therefore, *Hamling* requires reversal of the convictions herein.

Mr. Justice Rehnquist stated in *Hamling* that:

> While the language of 18 U.S.C. § 1461 has remained the same throughout this litigation, the statute defines an offense in terms of "obscenity," and this Court's decisions at least since *Roth v. United States, supra,* indicate that there are constitutional limitations which must be borne in mind in defining the statutory term. Thus any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case.

_____ U.S. _____, 41 L.Ed.2d, at 611. See also *Jenkins v. Georgia* _____ U.S. _____, 41 L.Ed.2d 642, 647. Mr. Justice Rehnquist thus recognized the need for fundamental fairness and due process of law when there exists, as here, a dichotomy between the law when an action occurs and the law when that action is the subject of a prosecution.

From this position, Mr. Justice Rehnquist in *Jenkins* went on to evaluate the "community standards" used in the Georgia Courts, and held that even though "community" need not be specifically defined, jurors are to draw upon their knowledge of their vicinage. Additionally, *Jenkins* held, based upon *Miller's* definition of "obscenity" and the statement therein that only "hard-core" pornography was to be proscribed, that juries do not have "unbridled discretion" in its decisions.

If the Petitioners were to be given the benefit of *Miller's* new constitutional standards, as this Court in *Hamling* and

Jenkins said they are entitled to, then it is clear that the press materials are not obscene when measured against community standards, something not done in the trial level court below. The Petitioners have thus been denied of due process of law because of the use of improper standards, because of the dichotomy between the standards applied in the trial and appellate levels, because the appellate court on remand acted as a trier of fact rather than a body of review, and because the materials are not obscene under the standards enumerated in *Miller*.

3. The Court of Appeals below decided that the *scienter* requirement for conviction of the Petitioners had been met. 490 F.2d at 77. Relying on its opinion in *United States v. Theris*, 484 F.2d 1149, and this Court's opinion in *United States v. Orito*, 413 U.S. 139, the Court of Appeals said that "Defendants' knowledge of the materials' sexual orientation is sufficient." 490 F.2d at 77. This by no means equates to scienter, and contrary to the Government's argument, it does not meet the requirements of Hamling.

As the Petitioner's Petition for a Writ of Certiorari stated, pp. 34-35 more than a general knowledge of the nature of the materials is required to show the requisite scienter. Also, the Petition pointed out that there was no competent evidence adduced at trial to support even this standard of the Court of Appeals. The Petitioners, apparently, have been borne out in their argument by this Court's decision in *Hamling, supra*.

Mr. Justice Rehnquist, writing of the *scienter* requirement for obscenity convictions under federal law, said:

> "It is constitutionally sufficient that the prosecution
> It is constitutionally sufficient that the prosecution
> show that a defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials." ____ U.S. ____ 41 L. Ed. 2d at 624.

It is clear from a reading of the record in this case that there wasn't a scintilla of evidence that the Petitioners had knowledge of the contents of the materials they distributed, nor that they knew either the character or the nature of the materials. Chief Justice Burger, writing for the majority of this Court in *Miller v. California*, 413 U.S. 15, said that:

> "... no one will be subject to prosecution for the sale of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct ...
>
> * * * * *
>
> "... a majority of this Court has agreed to isolate 'hard core' pornography from expression protected by the First Amendment."

413 U.S. at 27, 29. Yet the Court of Appeals would deem that a general knowledge of the Petitioners that the material was sexual in orientation is a sufficient showing of *scienter!*

This Court has said that sex and obscenity are not synonymous. *Roth v. United States*, 354 U.S. 476. See *Miller v. California*, 413 U.S. 15. This being the case, then to hold that the Petitioner had the requisite *scienter* because he might

have known of the materials' sexual orientation violates both the precepts of *Roth* and *Miller* on the one hand, and the tri-partite *scienter* test enunciated in *Hamling* on the other, in that not even one portion of the *Hamling* test has been met, there being no proof adduced at trial. With no showing of *scienter*, then a conviction cannot be had; or if it be had, then it would violate the holding of this Court in *Smith v. California*, 361 U.S. 147, condemning absolute criminal liability in obscenity cases. The only way whereby one might then avoid prosecution would be by engaging in self-censorship, a device scorned by this Court. *Carroll v. Comm'rs. of Princess Anne*, 393 U.S. 175; *Freedman v. Maryland*, 380 U.S. 51; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436. See *Dombrowski v. Pfister*, 380 U.S. 479; *Bantom Books, Inc. v. Sullivan*, 372 U.S. 58; *Shelton v. Tucker*, 364 U.S. 479; *Speiser v. Randall*, 357 U.S. 513.

4. The Petitioners have not retraced their arguments contained in the Petition for Writ of Certiorari. Rather, they have presented both intervening circumstances of substantial and controlling effect and substantial grounds not previously presented in their request for a rehearing. Based upon this Court's supervisory powers over the Federal Courts in the area of the administration of criminal justice, Petitioners hereby request that their Petition be granted so that the ends of Justice can best be served. *See, McNabb v. United States*, 365 U.S. 646; *Marshall v. United States*, 360 U.S. 310; *Gruenwald v. United States*, 353 U.S. 391

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioners pray that this Court grant rehearing of the Order of Denial, vacate that Order, grant the Petition, and review the Judgment and Opinion below.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq.
GILBERT H. DEITCH, Esq.
2005 One Hundred Colony Square
Atlanta, Georgia 30361
(404) 892-8890

Attorneys for Petitioners,
GARY VAN GUNDY &
RIVERGATE NEWS AGENCY,
INC.